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Supreme Court, U.S.
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JUN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRA BANKS,

Petitioner,

v.

FINLEY-SELIGMAN & LATZ, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S APPENDIX

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1986

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

IRA BANKS, Plaintiff,

v.

FINLEY-SELIGMAN & LATZ, INC., Defendant

DECISION AND ORDER C.A. No. 80-C-1056

This is an action for job reinstatement and front and back pay under 42 U.S.C. §§ 1981 and 2000e-5(f). Jurisdiction is predicated on 28 U.S.C. § 1343 and 42 U.S.C. § 2000e-5(f)(3). The plaintiff, formerly a jeweler in the defendant's employ, alleges in his second amended complaint that the defendant engaged in racially discriminatory employment tactics directed against him. It appears from the pleadings that the jurisdictional prerequisites to the claim under § 2000-5(f)(3) are satisfied. The defendant has moved for summary judgment. The motion is granted.

In March, 1972 the defendant hired plaintiff as an apprentice jeweler pursuant to Wisconsin's Apprentice Jeweler Program. Plaintiff was initially compensated in accordance with the salary schedule in that program. In December, 1974, plaintiff completed the program and became a fully qualified jeweler. He remained in defendant's employ and, like the two other nonmanagement jewelers employed by defendant, was paid on a "point system" —— a system awarding a certain number of points to a particular repair task. This method of compensation contrasts with the method by which defendant's watchmakers were compensated: the watchmakers received a percentage of the consumer price of their work. This difference in compensation formula generally

resulted in lower pay for the jewelers, although defendant affies that for a time, plaintiff actually earned more than certain watchmakers. In any event, the discrepancy prompted plaintiff to file a charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC"). While that charge was pending, plaintiff voluntarily terminated his employment with defendant. In September, 1980, the EEOC determined that there was no reasonable cause to believe that plaintiff had been discriminated against, and mailed him his Right-to-Sue letter. This suit was filed shortly thereafter.

The second amended complaint alleges racially discriminatory employment tactics in violation of 42 U.S.C. §§ 1981 and 2000e-2a. Although this latest complaint does not set forth the specific acts forming the basis of the alleged statutory violations, prior and subsequent pleadings filed by this pro se plaintiff indicate that the unequal compensation of jewelers and watchmakers is the subject of this action. Therefore, I treat the second count of the second amended complaint as arising under 42 U.S.C. § 2000e-2(a)(1), which, prohibits employment discrimination in respect to compensation.

In order to establish a prima facie case under § 1981, plaintiff must establish that he is a member of a racial minority and that he was unable to engage in or enjoy one of the statutorily enumerated activities or benefits due to the alleged discriminatory action. Additionally, he must show that the defendant's discrimination was intentional. *General Building Contractors v. Pennsylvania,* 50 U.S.L.W. 4975 (U.S. June 29, 1982). The elements of a prima facie case of racial discrimination with respect to wages are not clearly established, although a variant of the familiar four-part test of *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792, 803 (1973), would be appropriate. *Compare, Meyer v. Missouri State Highway Comm'n,* 567 F.2d 804 (8th Cir. 1977), *cert. denied,* 435 U.S. 1013 (1978) (discrimination in promotion and relocation). Upon a prima facie showing, the burden shifts to the employer to articulate a legitimate rationale

for the challenged action.

Similarly, in a disparate treatment case under Title VII, the plaintiff must establish that defendant acted with discriminatory animus. This can be inferred from a prima facie showing under *McDonnell-Douglas.* Again, when plaintiff establishes a prima facie case, the burden shifts to defendant to articulate a legitimate rationale for the challenged action. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

In this case, the defendant has carried its burden of establishing that its decision not to compensate plaintiff in the same manner as watchmakers was supported by a valid business purpose. The defendant has submitted affidavits tending to show that the positions of watchmaker and jeweler involve distinct skills and responsibilities. Moreover, as defendant has contended, the prices of jewelry materials fluctuate while the prices of watch components remain relatively constant, and the cost of jewelry can sometimes rise as high as ninety-nine percent of the consumer price. Thus, it would be unfeasible to compensate jewelers on the same basis as watchmakers.

Plaintiff does not challenge these assertions, but argues simply that watches, like all the items sold and serviced by the defendant, are jewels and therefore there is no legitimate basis for the watchmaker/jeweler categorization. The argument is too formalistic to be maintained, particularly in the face of defendant's business justification. Moreover, plaintiff's suggestion that the distinction in compensation rests not upon job responsibilities but upon race is squarely rebutted by defendant's showing that it employed two caucasians during plaintiff's term of employ, both of whom were compensated on the jeweler's scale.

The Court has reviewed the remaining allegations in the sundry pleadings and documents and finds them to be either unmeritorious or irrelevant. Because defendant has adequately carried its burden of proof, I conclude that it is entitled to judgment as a matter of law. *See Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1219-20 (7th Cir. 1980).

THEREFORE, IT IS ORDERED that defendant's motion for summary judgment is granted.

Dated at Milwaukee, Wisconsin, this 13th day of Oct., 1983.

BY THE COURT:

John W. Reynolds
Chief U.S. District Judge

U.S. District Court East Dist. Wisc.
FILED
OCT 13, 1983
SOFRON B. NEDILSKY
CLERK

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

IRA BANKS,

v.

FINLEY-SELIGMAN & LATZ, INC.

CIVIL ACTION FILE No. 80-C-1056

This action came on for (hearing) before the Court, Honorable JOHN W. REYNOLDS, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, granting defendant's motion for summary judgment. It is Ordered and Adjudged that this action is hereby dismissed.

Dated at Milwaukee, Wisconsin, this 13th day of October, 1983.

U.S. District Court East Dist. Wisc.
FILED
OCT 13, 1983
SOFRON B. NEDILSKY
CLERK

UNITED STATES DISTRICT COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(SUBMITTED) September 20, 1984
October 29, 1984

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

UNPUBLISHED ORDER NOT
TO BE CITED PER
CIRCUIT RULE 35

IRA BANKS, Plaintiff-Appellant,

v.

FINLEY-SELIGMAN & LATZ, INC., Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 80-C-1056
John W. Reynolds, Judge

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f).* The plaintiff has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

ORDER

After receiving two "right-to-sue" letters from the Equal Employment Opportunity Commission (E.E.O.C.) based on two separate charges, the *pro se* plaintiff, Ira Banks, brought suit against his former employer, Finley-Seligman & Latz, in the Eastern District of Wisconsin. The plaintiff's first "right-to-sue" letter, and his initial claim in the district court, were based on his charge that the defendant's pay system caused him to be paid less than certain white employees. The district court granted summary judgment on that claim, and we affirm. The plaintiff's second letter and his second claim in the district court concern his allegation that he was discharged in retaliation for protected Title VII activity. *See* 42 U.S.C. § 2000e-3. After reviewing the papers and affidavits filed, the district judge granted summary judgment for the defendant on the retaliation claim. We reverse and remand for further proceedings that portion of the case in which there are disputed issues of material fact.

The defendant is engaged in the business of repairing jewelry, watches, and similar items. The plaintiff, after completing an apprenticeship with the defendant in December 1974, continued to work for the defendant in the Gimbels Milwaukee, Wisconsin store as a fully qualified jeweler, until March 28, 1980. The plaintiff, a black, alleges that he was discriminated against on the basis of race because, as a jeweler, he was compensated for repair jobs at a piece-work rate (i.e. a rate based on the number of pieces completed) that was lower than the piece-work rate applied to repair jobs completed by watchmakers, who were all of the white race. Watchmakers were paid a percentage of the retail cost of the watch repair. In contrast, the method of compensation to jewelers was not based on the customer's cost of the repair, but on a point system that varied with the difficulty of the repair job.

With respect to the plaintiff's claim of racial discrimination in compensation, which formed the basis of his first right-to-sue letter, the district court ruled that the defen-

dant had established a business justification for its practice. The plaintiff disputes the court's conclusion. However, we need not reach this issue because the plaintiff has not made out a prima facie case of discrimination. Certainly, Title VII does protect against employment practices that are "fair in form but discriminatory in operation." *See Connecticut v. Teal,* 102 S. Ct. 2525, 2531 (1982). However, to attack facially neutral employment standards, such as the two methods of compensation at issue in this case, the plaintiff must establish that they have a disparate impact on minority group members. *See Carpenter v. Board of Regents of the University of Wisconsin,* 728 F.2d 911, 914 (7th Cir. 1984). The plaintiff has failed to do this. It is uncontroverted that part of the time that the plaintiff was employed by defendant, two whites were also employed as jewelers and were paid according to the same point system as the plaintiff. Title VII is silent about the method that employers select to figure wages, so long as the method does not have an adverse impact on minorities. Similarly the plaintiff's claim, under 42 U.S.C. Sections 1981 and 2000e-2, that the defendant's use of different methods to calculate the wages of watchmakers and jewelers constituted intentional race discrimination, must also fail. While the plaintiff has shown that watchmakers and jewelers had different pay scales he has not given any indication that he was treated differently as a jeweler because he is black. *See Ekanem v. Health and Hospital Corp.* 724 F.2d 563, 569 (7th Cir. 1983). White jewelers were paid according to the same point system as the plaintiff, and the district court properly entered summary judgment on the plaintiff's claim of discrimination in compensation.

As noted above, the district court also granted summary judgment on the plaintiff's allegation, which is the subject of his second right-to-sue letter, that he was terminated from his employment because he filed the above charge with the E.E.O.C. Filing a claim of employment discrimination is protected activity under Title VII, 42 U.S.C. § 20000e-3, regardless of whether the complaining party prevails in the

underlying charge of discrimination. *See Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041, 1043 (7th Cir. 1980). The defendant entered affidavits stating that the plaintiff was not discharged but had voluntarily resigned. The defendant also submitted affidavits that the plaintiff was insubordinate in refusing to do a "special repair job" on a bracelet, and argued that this insubordination would have provided a legitimate nondiscriminatory reason to fire the plaintiff in any event. These affidavits, standing alone, might have been sufficient to support a grant of summary judgment for the defendant. In this case, however, the plaintiff (acting *pro se*) did not merely rest on the allegations in his complaint, *See Patterson v. General Motors*, 631 F.2d 476, 482 (7th Cir. 1980), but offered his own counter-affidavits in which he denied he had voluntarily resigned, and asserted that, at a meeting with officials of his former employer, his supervisor had threatened to quit unless the plaintiff was discharged. Further, the plaintiff averred that he, in fact, did repair the bracelet in question, contrary to the defendant's claims of insubordination. The plaintiff's affidavits raise disputed issues of fact that are material to the disposition of his retaliation claim. In light of this factual dispute the defendant's filings are inadequate to demonstrate that it is entitled to judgment as a matter of law. *See Big O Tire Dealers Inc. v. Big O Warehouse*, Nos. 83-2863 & 83-2902, slip op. at 9-10 (7th Cir. Aug. 17, 1984). Consequently, we remand the case for further proceedings consistent with this opinion.

The decision of the district court is AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

JUDGMENT IN A CIVIL CASE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

IRA BANKS,

v.

FINLEY-SELIGMAN & LATZ, INC.

Docket No. 80-C-1056
Judge John W. Reynolds

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered. IT IS ORDERED AND ADJUDGED that this action is hereby dismissed.

U.S. District Court East. Dist. Wisc.
FILED
JAN 10, 1985
SOFRON B. NEDILSKY
CLERK

UNITED STATES DISTRICT COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(SUBMITTED) August 22, 1985*
September 4, 1985
Unpublished order not be cited per circuit rule 35

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge

IRA BANKS, Plaintiff-Appellant,

v.

FINLEY-SELIGMAN & LATZ, INC., Defendant-Appellee.

No. 85-1188

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 80 C 1056
John W. Reynolds, Judge

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

Plaintiff-appellant Ira Banks appeals the district court order of January 10, 1985 dismissing his employment discrimination action against defendant-appellee, Finley-Seligman & Latz, Inc. We affirm for the reasons explained below.

I.

Banks, a black jeweler, filed two employment discrimination claims with the Equal Employment Opportunity Commission against the defendant, his employer. The first claim alleged that the defendant's pay system was discriminatory because it caused him to be paid less than certain white employees. The second claim alleged that Banks was discharged by the defendant in retaliation for protected Title VII activity. *See* 42 U.S.C. § 2000e-3; *Klein v. Trustees of Indiana University,* No. 84-2124, slip op. (June 20, 1985); *Mozee v. Jeffboat, Inc.,* 746 F.2d 365 (7th Cir. 1984); *McCluney v. Jos. Schlitz Brewing Co.,* 728 F.2d 924 (7th Cir. 1984). After receiving right to sue letters on both claims, Banks filed suit in federal district court raising both claims. The district court granted summary judgment for the defendant on both claims. On appeal, we affirmed by unpublished order the grant of summary judgment on the claim that the defendant's pay structure was discriminatory, *Banks v. Finley-Seligman & Latz, Inc.,* No. 83-2981, unpublished order (7th Cir. Oct. 29, 1984). We reversed and remanded for further proceedings, however, with respect to the claim that Banks was terminated in retaliation for filing a claim against the defendant. On remand, the district court held a lengthy evidentiary hearing at the conclusion of which it dismissed Bank's claim, finding that Banks had failed to establish that he was terminated in retaliation for filing a discrimination claim against the defendant. It is from this decision that Banks appeals.

II.

Construing Banks' *pro se* briefs liberally, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Bates v. Jean*, 745 F.2d 1146, 1150 (7th Cir. 1984), Banks contends the district court erred in concluding that he was not discharged in retaliation for filing a discrimination claim. "To establish a prima facie case of retaliatory discharge under 42 U.S.C. § 2000e.3, the plaintiff must show: (1) he opposed an employment practice that was unlawful within the meaning of Title VII; (2) he suffered an adverse action by his employer; (3) because of his opposition or participation." (footnote omitted). *Klein*, slip op. at 7; *Rucker v. Higher Educational Aids Bd.*, 669 F.2d 1179, 1182. The plaintiff must additionally establish that the employer "would not have taken the adverse action 'but for' his opposition or participation." *Klein*, slip op. at 8 citing *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 928 (7th Cir. 1984).

The *prima facie* proof analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is applicable to retaliatory discharge claims. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 235 n. 5 (1981) (The *McDonnell* analysis is flexible and adaptable to different fact situations); *Klein*, slip op. at 7, n. 3. Once the plaintiff establishes a *prima facie* case of employment discrimination, a rebuttable presumption of discrimination arises and the burden then shifts to the defendant to rebut the discrimination by articulating a legitimate, nondiscriminatory reason for its action. *McDonnell Douglas*, 411 U.S. at 802. If the defendant successfully rebuts the presumption of discrimination, the plaintiff must have the opportunity to demonstrate that the alleged reason for the employment action was merely pretextual. *Id.*

III.

In the present case, we vacated the award of summary judgment on the retaliation claim and remanded this case

to the district court for further proceedings. On remand, Banks tried his retaliation claim before the district court and, at the conclusion of the trial, the district court entered judgment for the defendant, finding that Banks had failed to demonstrate that he was discharged in retaliation for filing a complaint against the defendant. "In this Title VII case, our ultimate task is 'to determine whether the [plaintiffs have] proven that the defendants have discriminated against [them].'" *Mozee,* 746 F.2d at 369, citing *Epstein v. Secretary,* 739 F.2d 274, 278 (7th Cir. 1984). Our review of the district court's fact-findings is governed by the clearly erroneous test, Fed. R. Civ. P. 52(a), *Suson v. Zenith Radio Corp.,* 763 F.2d 304, 307 (7th Cir. 1985), while our review of the district court's ultimate conclusion of discrimination *vel non* is not so constrained. *Mozee,* 746 F.2d at 369; *Epstein,* 739 F.2d 274, 278-79 (7th Cir. 1984). After a careful review of the record, we concur with the district court's finding that Banks failed to establish that he was discharged in retaliation for filing a discrimination claim against the defendant.

The record reflects that Banks was hired by the defendant as a jeweler in 1972, that Banks filed a discrimination claim against the defendant relating to methods of payment on November 28, 1978, and that Banks left employment with the defendant on March 28, 1980, 16 months later. Banks then filed his second discrimination claim, alleging that he had been discharged in retaliation for filing his discrimination claim 16 months earlier. During this sixteen month period, Banks' work assignments and hours remained the same. On March 28, 1980, a dispute arose over repairs completed by Banks on a bracelet. Freinik, Banks' supervisor, requested Banks to redo repairs to the bracelet because they had not been completed correctly the first time. The defendant's policy in effect at the time required all employees to redo work again for various reasons, regardless of whose fault it was. Banks declined to redo the work. Freinik notified Sadow, the vice-president of the company, who called Banks into his office and an argument ensued. Banks con-

tended that Sadow brought up the discrimination charge at the meeting (although he could not remember what was said about it) and that Freinik stated to Sadow that if Banks was not fired, Freinik would quit. Banks also contended that he had discussed the discrimination charges with Freinik prior to the meeting: Banks testified that he was terminated at the meeting, allegedly in retaliation for filing the discrimination claim sixteen months earlier against the defendant.

Freinik testified that Banks was not terminated at the meeting but simply told that he had the option of performing the requested work or quitting and that Banks then stormed out of the meeting, picked up his tools and left. Freinik testified that the discrimination charge was never mentioned at the meeting with Sadow. Sadow testified that Freinik came into his office, complaining that Banks had refused to perform repairs upon a bracelet. Sadow called Banks into his office and Banks once again reiterated that he would not perform the jewelry repairs. At that point, Sadow told Banks that "it's a free country, you can work anyplace you want . . . if you want to quit, you can quit," (R. at 104). Banks then left the office, picked up his tools and left. Finally, Costigan, an employee of the defendant, testified that he was present in the shop at the time of the argument. Costigan saw Banks storm out of Sadow's office, throw his tools in a bag and leave. He stated that although he was aware that Banks had filed a discrimination charge against the defendant, he does not recall Banks being treated any differently than the other employees.

Basically, this case hinges on a question of credibility which we are hesitant to second-guess on appeal absent clear error. *Anderson v. City of Bessemer City,* _____ U.S. _____, 105 S. Ct. 1504, 1512-13 (1985); *In re Lemmon & Co., Inc.,* 742 F.2d 1064, 1070 (7th Cir. 1984); *Luedtke Eng. Co. v. Ind. Limestone Co.,* 740 F.2d 598, 601 (7th Cir. 1984); *Walsh v. Brewer,* 733 F.2d 473, 477 (7th Cir. 1984). Ample evidence supported the district court's determination that Banks was not discharged in retaliation for filing a discrimination

claim. Sixteen months passed between the time that Banks filed his discrimination claim and his subsequent termination of employment with the defendant. Banks himself was unable to point to overt instances of harassment or discrimination arising from the discrimination charge which he filed.[1] Although Banks testified that Sadow fired him in retaliation for filing the claim, both Sadow and Freinik testified otherwise. As such, we agree with the district court that Banks failed to establish that he was terminated in retaliation for filing a discrimination claim against the defendant.

AFFIRMED

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[1] THE COURT: Now why do you think one year and four months later, when you were discharged, that you were discharged for filing that complaint on November 28, 1978? Why do you think that?

A. Why do I think it? Simply because at the time from November of '78 until I was terminated, the type of work they needed done, I was the only one who was doing it. And this was in regards to their sales. As the year progressed, Mr. Freinik, who had gotten a friend of his and a couple outside stores to do some of the repairs, Mr. Freinik had become a little more hostile toward me in that category. Simply because I am assuming he did not feel I was no longer needed. That followed up with his threats as far as my being terminated.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 26, 1985

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge

IRA BANKS, Plaintiff-Appellant,

v.

FINLEY-SELIGMAN & LATZ, INC., Defendant-Appellee.

No. 85-1188

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 80 C 1056
John W. Reynolds, Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellant, all of the judges on the panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.